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Super Sea Cable Networks Pte Ltd v SACOFA Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC(ARB)-25–07 OF 2023
CHAN SOW KENG J
6 OCTOBER 2023

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Arbitration — Enforcement — Foreign award — Application by applicant for court to recognise and enforce final award by Singapore International Arbitration Centre against respondent by entry as judgment pursuant to s 38 of Arbitration Act 2005 ('Act 646') — Respondent resisted application pursuant to s 39 of Act 646 — Whether matters dealt with in final award were matters within the domain of the arbitrator — Whether issues raised by respondent fell within any of grounds under s 39 of Act 646 — Whether final award binding — Whether final award should be recognised and enforced — Arbitration Act 2005 ss 8, 36, 38(1) & 39

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Super Sea Cable Networks Pte Ltd ('the applicant' or 'SSCN') and SACOFA Sdn Bhd ('the respondent' or 'SACOFA') had entered into a strategic alliance agreement ('SAA') and three supplementary agreements. Clause 25 of the SAA provided that any dispute between the parties shall be referred to arbitration. There was indeed dispute between the parties and the matter was referred to the Singapore International Arbitration Centre ('the SIAC'). The arbitrator then issued the final award on 14 July 2023. The applicant subsequently filed the present originating summons ('the OS') for the dispositive portion of the final award be recognised as binding and be enforced against the respondent by entry as a judgment of the High Court of Malaya in terms of the final award pursuant to s 38(1) of the Arbitration Act 2005 ('Act 646'). The dispositive portion of the final award sought to be registered was as followed: (a) a declaration that the applicant had the right to property namely the applicant's built facilities (as defined in cl 6.1 of the SAA), including the CCS that was marked with 'SEAX' and all equipment that lay therein per exh C7; (b) an order that the respondent shall deliver-up the applicant's built facilities to the applicant or its nominated party within 28 days of 14 July 2023 (ie, the date of the final award); (c) that the extraction and delivery up of the applicant's built facilities shall be monitored by an independent and qualified third party, namely Leo Cheong Swee or such other duly qualified party as shall be appointed by the applicant at its own cost and notified by the applicant to the respondent; (d) each party shall bear its own legal and other costs; (e) the costs of the SIAC arbitration shall be borne equally as between the parties; and (f) all other claims in this arbitration be dismissed. The respondent resisted the OS pursuant to s 39 of Act 646 and submitted that: (i) the SIAC's decision that the applicant was the beneficial owner of the applicant's built facilities arising from

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its interpretation of cl 6 of the SAA was not in accordance with Malaysian law; (ii) the arbitrator was not empowered to make a decision that the respondent had committed the act of conversion of the applicant's built facilities and made an award for the delivery up of the built facilities because Malaysian law dictated that orders for delivery up could only be granted as a relief in claims for detinue and not conversion; and (iii) the applicant's claim for conversion in the SIAC arbitration overlapped with that of the respondent's Johor Bahru High Court suit ('the JBHC suit').

Held, allowing the OS with costs to the applicant subject to allocator:

(1) In this case, it was not disputed that the applicant had complied with the formal requirements by producing the duly certified copy of the final award and the duly certified copy of the SAA (and the three supplementary agreements). The burden then shifted to the respondent to satisfy the court why recognition and enforcement should not avail the applicant (see para 18).

(2) As regards the arbitrator's conclusion on ownership of the applicant's built facilities, given the construction of the SAA was a question of law to be determined by, and within the remit of the arbitrator, the court took the view that even if the arbitrator had wrongly interpreted the SAA, it did not bring the matter within s 39 of Act 646 as the court was not entitled to substitute its own interpretation. Not only that, s 36 of Act 646 and r 32.11 of the SIAC Rules made the final award final, binding and conclusive (see paras 28 & 30).

(3) The court agreed with the applicant's argument that the respondent's contentions that there were overlaps between the SIAC arbitration and the JBHC suit and that under Malaysian law, orders for delivery up could only be granted as relief in claims for detinue and not conversion were clearly caught by the principle of res judicata as such the court should not accede to the respondent's attempt to resuscitate this issue. The court found this to be an abuse of process. The respondent was estopped from relying on such a ground (see para 32).

(4) The court found that the respondent's objections on the tribunal's failure to apply Malaysian law as the agreed governing law by the parties, and/or failed to adhere to stare decisis had not been made out. Even if the arbitrator had applied the law erroneously (the court made no such conclusion), it was not for the court to intervene. This was because to succeed on the public policy ground, the respondent had to contend with a very high threshold and 'demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice'. In the court's view, the respondent had not demonstrated any such circumstances here that violated the most basic notions of morality and justice. There was no risk that registration and/or

enforcement of the final award would contravene the Communications and Multimedia Act 1998 as relief No 2 of the final award allowed delivery-up to be made to, inter alia, the applicant's nominated party SEAX Malaysia Sdn Bhd who was in possession of the relevant licences. This was in fact addressed by the arbitrator in the final award. The court thus found there was nothing illegal in the award that contravened public policy (see paras 33–34 & 36–37).

(5) On the complaint by the respondent that the arbitrator had selectively read the statement of claim that had been amended and reamended, and reformulated the basis of the claim for conversion as being grounded only on the 'padlocking of the SSCN's built facilities' and thus not the dispute that was referred to arbitration, in the court's view, it still boiled down to the crux of the dispute which was essentially on who had the right to property in the applicant's built facilities; this was clearly connected to and/or arose out of the SAA, namely cl 6 of the SAA and thus within the remit of the arbitrator. In this regard, the court agreed with the applicant that the respondent could have availed itself of an application under the r 29.1(b) of the SIAC Rule for early dismissal of the SIAC arbitration if the respondent felt that the applicant's claims or reliefs were outside of the arbitrator's jurisdiction or the scope of arbitration, but the respondent did not make such application (see para 38).

(6) Section 39 of Act 646 restricted the specific grounds upon which recognition or enforcement of an award could be refused by the courts. Reading the award generously, the court held that the matters dealt with in the final award were matters well within the arbitrator's domain. The court failed to see any procedural irregularities. In the court's view, the respondent's complaints amounted to the failure of the arbitrator to appreciate evidence, facts and arguments which the respondent conceived as favourable to it, and in effect, stripped bare of legal niceties. This was nothing more than a challenge on the merits of the claim, which was not open for the court to delve into as they did not concern s 39 of Act 646. These matters were comprehensively dealt with in the course of arbitration. The respondent as the losing party in arbitration was not entitled to relitigate. Further, the court found that the arbitrator did not err in law and fact in arriving at his conclusions. It was trite that the arbitrator was the master of facts. Even if he did err, it was not a ground for setting aside or to refuse recognition. Considering that the issues raised by the respondent did not fall within any of the grounds set out in s 39 of Act 646, the court's intervention was therefore circumscribed by s 8 of Act 646. In consequence, the final award was final and binding pursuant to r 32.11 of the SIAC Rules and s 36(1) of Act 646. The respondent was therefore bound to comply with the final award by 11 August 2023. The court therefore had no valid reason not to recognise and enforce the final award (see paras 19, 23–24, 26, 40, 42 & 45–47).

A **[Bahasa Malaysia summary**

Super Sea Cable Networks Pte Ltd ('pemohon' atau 'SSCN') dan SACOFA Sdn Bhd ('responden' atau 'SACOFA') telah memeterai perjanjian pakatan strategik ('SAA') dan tiga lagi perjanjian tambahan. Klausa 25 SAA tersebut memperuntukkan bahawa apa-apa pertikaian antara pihak-pihak hendaklah dirujuk kepada timbang tara. Memang terdapat pertikaian antara pihak-pihak dan perkara tersebut dirujuk kepada Singapore International Arbitration Centre ('SIAC'). Penimbangtara kemudiannya mengeluarkan awad akhir pada 14 Julai 2023. Pemohon kemudiannya memfailkan saman pemula ('SP') semasa bagi memohon agar bahagian dispositif awad akhir tersebut diiktiraf sebagai mengikat dan dikuatkuasakan terhadap responden melalui kemasukan sebagai penghakiman Mahkamah Tinggi Malaya dalam terma awad akhir tersebut menurut s 38(1) Akta Timbang Tara 2005 ('Akta 646'). Bahagian dispositif awad akhir yang ingin didaftarkan adalah seperti berikut: (a) pengisytiharan bahawa pemohon mempunyai hak ke atas harta iaitu kemudahan yang dibina pemohon (seperti yang ditakrifkan dalam klausa 6.1 SAA), termasuk CCS yang ditandakan dengan 'SEAX' dan semua peralatan yang terdapat di dalamnya seperti yang terdapat dalam eksh 'C7'; (b) perintah bahawa responden hendaklah menyerahkan kemudahan yang dibina pemohon kepada pemohon atau pihak yang dicalonkan dalam tempoh 28 hari dari 14 Julai 2023 (iaitu, tarikh awad akhir tersebut); (c) bahawa pengekstrakan dan penghantaran kemudahan binaan pemohon hendaklah dipantau oleh pihak ketiga yang bebas dan berkelayakan, iaitu Leo Cheong Swee atau pihak lain yang layak yang perlu dilantik oleh pemohon atas kosnya sendiri dan dimaklumkan oleh pemohon kepada responden; (d) setiap pihak hendaklah menanggung kos perundangan dan lain-lain kosnya sendiri; (e) kos timbang tara SIAC hendaklah ditanggung sama rata antara pihak-pihak; dan (f) semua tuntutan lain dalam timbang tara ini ditolak. Responden menentang SP tersebut menurut s 39 Akta 646 dan berhujah bahawa: (i) keputusan SIAC bahawa pemohon adalah pemilik benefisial kemudahan yang dibina pemohon yang timbul daripada tafsirannya ke atas klausa 6 SAA adalah tidak mengikut undang-undang Malaysia; (ii) penimbang tara tidak diberi kuasa untuk membuat keputusan bahawa responden telah melakukan tindakan penukaran kemudahan binaan pemohon dan membuat award 'delivery up' kemudahan yang dibina kerana undang-undang Malaysia menetapkan bahawa perintah 'delivery up' hanya boleh dibuat sebagai pelepasan dalam tuntutan untuk detinu dan bukan penukaran; dan (iii) tuntutan pemohon untuk penukaran dalam timbang tara SIAC bertindih dengan tuntutan saman Mahkamah Tinggi Johor Bahru responden ('saman MTJB').

Diputuskan, membenarkan SP dengan kos kepada pemohon tertakluk kepada alokator:

(1) Dalam kes ini, tidak dipertikaikan bahawa pemohon telah mematuhi keperluan formal dengan mengemukakan salinan awad akhir yang

diperakui sewajarnya dan salinan SAA yang diperakui sewajarnya (dan tiga perjanjian tambahan tersebut). Beban kemudiannya beralih kepada responden untuk memuaskan hati mahkamah mengapa pengiktirafan dan penguatkuasaan tidak sepatutnya memberi manfaat kepada pemohon (lihat perenggan 18).

(2) Berkenaan dengan kesimpulan penimbang tara mengenai pemilikan kemudahan yang dibina pemohon, memandangkan pembinaan SAA adalah persoalan undang-undang yang akan ditentukan oleh, dan dalam bidang kuasa penimbang tara, mahkamah mengambil pandangan bahawa walaupun penimbang tara telah salah mentafsir SAA, ia tidak membawa perkara tersebut dalam s 39 Akta 646 kerana mahkamah tidak berhak untuk menggantikan tafsirannya sendiri. Bukan itu sahaja, s 36 Akta 646 dan k 32.11 Kaedah-Kaedah SIAC menjadikan awad akhir tersebut muktamad, mengikat dan konklusif (lihat perenggan 28 & 30).

(3) Mahkamah bersetuju dengan hujah pemohon bahawa hujah responden bahawa terdapat pertindihan antara timbang tara SIAC dan saman MTJB dan bahawa di bawah undang-undang Malaysia, perintah 'delivery up' hanya boleh diberikan sebagai pelepasan dalam tuntutan untuk detinu dan bukan penukaran adalah jelas terhalang oleh prinsip res judicata, oleh itu, mahkamah tidak sepatutnya bersetuju dengan percubaan responden untuk menghidupkan semula isu ini. Mahkamah mendapati ini sebagai penyalahgunaan proses. Responden telah dihalang daripada bergantung pada alasan sedemikian (lihat perenggan 32).

(4) Mahkamah mendapati bantahan responden berkenaan kegagalan tribunal tersebut untuk menggunakan undang-undang Malaysia sebagai undang-undang yang dipersetujui oleh pihak-pihak, dan/atau gagal mematuhi stare decisis gagal dibuktikan. Andai kata penimbang tara telah terkhilaf dalam menggunakan undang-undang sekalipun (mahkamah tidak membuat kesimpulan sedemikian), mahkamah tidak boleh campur tangan. Ini kerana untuk berjaya di atas dasar awam, responden terpaksa berdepan dengan ambang yang sangat tinggi dan 'demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice'. Dalam pandangan mahkamah, responden tidak menunjukkan apa-apa keadaan sedemikian di sini yang melanggar tanggapan yang paling asas tentang moral dan keadilan. Tiada risiko bahawa pendaftaran dan/atau penguatkuasaan awad akhir tersebut akan melanggar Akta Komunikasi dan Multimedia 1998 kerana pelepasan No 2 awad akhir tersebut membenarkan penghantaran dibuat kepada, antara lain, pihak yang dicalonkan pemohon SEAX Malaysia Sdn Bhd yang memiliki lesen yang berkaitan. Ini sebenarnya telah ditangani oleh penimbang tara dalam awad akhir tersebut. Oleh itu, mahkamah mendapati tiada apa-apa yang menyalahi undang-undang dalam award tersebut yang

melanggar dasar awam (lihat perenggan 33–34 & 36–37).

(5) Mengenai aduan oleh responden bahawa penimbang tara telah membaca secara selektif pernyataan tuntutan yang telah dipinda dan dipinda semula, dan merumuskan semula asas tuntutan untuk penukaran sebagai berasaskan hanya pada 'padlocking of the SSCN's built facilities' dan dengan itu bukan pertikaian yang dirujuk kepada timbang tara, pada pandangan mahkamah, ia masih merujuk kepada pokok pertikaian yang pada asasnya adalah mengenai siapa yang mempunyai hak ke atas harta dalam kemudahan yang dibina pemohon; ini jelas berkaitan dengan dan/atau timbul daripada SAA tersebut, iaitu klausa 6 SAA dan dengan itu dalam bidang kuasa penimbang tara. Dalam hal ini, mahkamah bersetuju dengan pemohon bahawa responden boleh mendapatkan sendiri permohonan di bawah k 29.1(b) Kaedah-Kaedah SIAC untuk penolakan awal timbang tara SIAC jika responden merasakan bahawa tuntutan atau pelepasan pemohon adalah di luar bidang kuasa penimbang tara atau skop timbang tara, tetapi responden tidak membuat permohonan sedemikian (lihat perenggan 38).

(6) Seksyen 39 Akta 646 mengehadkan alasan-alasan khusus di mana pengiktirafan atau penguatkuasaan sesuatu award boleh ditolak oleh mahkamah. Membaca keseluruhan award tersebut, mahkamah memutuskan bahawa perkara yang ditangani dalam awad akhir tersebut adalah perkara yang berada dalam ruang lingkup penimbang tara. Mahkamah gagal melihat apa-apa ketakaturan prosedur. Pada pandangan mahkamah, aduan-aduan responden berjumlah kepada kegagalan penimbang tara untuk menghargai keterangan, fakta dan hujah yang difikirkan oleh responden sebagai memihak kepadanya, dan pada hakikatnya, menanggalkan perkara yang baik di sisi undang-undang. Ini tidak lebih daripada satu cabaran mengenai merit tuntutan tersebut, yang tidak boleh ditentukan oleh mahkamah kerana ianya tidak berkaitan dengan s 39 Akta 646. Perkara-perkara ini telah ditangani secara menyeluruh dalam perjalanan timbang tara. Responden sebagai pihak yang kalah dalam timbang tara tidak berhak untuk litigasi semula. Selanjutnya, mahkamah mendapati bahawa penimbang tara tidak terkhilaf dari segi undang-undang dan fakta dalam membuat kesimpulannya. Sudah mantap bahawa penimbang tara adalah pakar fakta. Walaupun dia melakukan kekhilafan, ia bukan alasan untuk mengenepikan atau menolak pengiktirafan. Memandangkan isu yang dibangkitkan oleh responden tidak termasuk dalam mana-mana alasan yang dinyatakan dalam s 39 Akta 646, maka campur tangan mahkamah tidak dibenarkan oleh s 8 Akta 646. Akibatnya, awad akhir tersebut adalah muktamad dan mengikat menurut k 32.11 Kaedah-Kaedah SIAC dan s 36(1) Akta 646. Justeru, responden terikat untuk mematuhi awad akhir tersebut selewat-lewatnya pada 11 Ogos 2023. Oleh yang demikian, mahkamah tidak mempunyai alasan yang sah untuk tidak

mengiktiraf dan menguatkuasakan awad akhir tersebut (lihat perenggan 19, 23–24, 26, 40, 42 & 45–47).] A

Cases referred to

AJT v AJU [2010] 4 SLR 649, HC (refd)
AKN and another v ALC and others and other appeals [2015] SGCA 18; [2015] 3 SLR 488, CA (refd) B
Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal [2014] 3 MLJ 648; [2014] 4 CLJ 525, CA (refd)
CTI Group Inc v International Bulk Carriers SPA [2017] 5 MLJ 314, FC (refd)
Cairn Energy India Pty Ltd & Anor v The Government of India [2009] 6 MLJ 795, CA (refd) C
Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)
Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd and another application [2012] 5 MLJ 809, HC (refd) D
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 9 CLJ 213, FC (refd)
OSK Trustees Bhd (as trustees for Sunway Real Estate Investment Trust) & Anor v Metroplex Holdings Sdn Bhd [2020] 3 MLJ 358, CA (refd)
PT Asuransi Jaya Indonesia (Persero) v Dexia Bank SA [2006] SGCA 41, CA (folld) E
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd & another appeal [2021] 1 MLJ 1; [2020] 9 CLJ 466, FC (refd)
Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor [1982] 2 MLJ 165; [1982] CLJ Rep 257, FC (refd) F
Qingdao Hongdaxinrong International Trade Co Ltd v Charterwin Trading Sdn Bhd and other cases [2023] MLJU 1467, HC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1, FC (refd) G
Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] SGCA 28; [2007] 3 SLR 86, CA (folld)
Stone World Sdn Bhd v Engareh (M) Sdn Bhd [2020] 12 MLJ 237; [2020] 9 CLJ 358, FC (refd) H
Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd [2010] 3 SLR 1, HC (refd)
Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd) I
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)
Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd [2016] 6 MLJ 166, CA (refd)

A *Tune Talk Sdn Bhd v Padda Gurtaj Singh* [2020] 3 MLJ 184, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 20, 36, 36(1), 38, 38(1), (2), 39, 39(1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(b)(ii)

B Communications and Multimedia Act 1998 s 126

Courts of Judicature 1964 s 44

Lim Chee Wee (with Alvin Oh Seong Yew, Sew Chang Peng and Sarah Chin Yuan Ching) (Lim Chee Wee Partnership) for the plaintiff.

C *Malik Imtiaz (with S Muralitharan, Khoo Suk Chyi, Wong Meng Yen and Lai Chun Sheng) (Murali Sangaran) for the defendants.*

Chan Sow Keng J:

D INTRODUCTION

[1] This originating summons ('OS') was filed by the applicant for the dispositive portion of the final award dated 14 July 2023 made by Mr Peter Godwin, the sole arbitrator appointed for the Singapore International E Arbitration Centre ('SIAC') Arbitration Case No 304 of 2022 between the applicant ie Super Sea Cable Networks Pte Ltd ('SSCN') and the respondent ie SACOFA Sdn Bhd ('SACOFA'), be recognised as binding and be enforced against SACOFA by entry as a judgment of the High Court of Malaya in terms of the final award pursuant to s 38(1) of the Arbitration Act 2005 ('the AA'). F

[2] After having read the cause papers, considered the submissions of the parties and heard their oral arguments, I have allowed the OS with costs on 21 August 2023. This judgment contains the full reasons for my decision.

G BACKGROUND FACTS

[3] The background facts are culled from the cause papers and submissions of the parties.

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[4] SSCN is a company incorporated under the laws of Singapore with its registered address at 133 New Bridge Road #18–03, Chinatown Point, 059413 Singapore.

I **[5]** SACOFA is a company incorporated under the laws of Malaysia with a registered address at Level 3, Wisma Mahmud, Jalan Sungai Sarawak, 93100 Kuching, Sarawak.

[6] SSCN and SACOFA entered into a contract known as to the strategic alliance agreement dated 20 December 2013 ('SAA'). The SAA was subsequently amended by three supplemental agreements dated 3 March 2016, 7 December 2017 and 14 December 2021.

[7] Pursuant to cl 25 of the SAA, SSCN and SACOFA agreed that any dispute, in connection with, or arising out of the agreement or the performance of the obligations of the parties, shall be referred to arbitration.

[8] Disputes arose between the applicant and respondent. The applicant commenced arbitration proceedings against the respondent.

[9] The arbitration was conducted by Mr Peter Godwin ('Arbitral Tribunal, interchangeably the arbitrator'), in accordance with the Arbitration Rules of the SIAC. The seat of the arbitration is Singapore.

[10] The Final Award No 089 of 2023 was issued by the SIAC on 14 July 2023.

[11] The dispositive portion of the final award sought to be registered is produced:

(a) a declaration that SSCN has the right to property namely SSCN's built facilities (as defined in cl 6.1 of the SAA), including the CCS that is marked with 'SEAX' and all equipment that lies therein per exh C7;

(b) an order that SACOFA shall deliver-up SSCN's built facilities (as defined by cl 6.1 of the SAA) to SSCN or its nominated party within 28 days of 14 July 2023 (ie, the date if the final award);

(c) that the extraction and delivery up of SSCN's built facilities shall be monitored by an independent and qualified third party, namely Leo Cheong Swee (Singapore NRIC No S8860746E) or such other duly qualified party as shall be appointed by SSCN at its own cost and notified by SSCN to SACOFA;

(d) each party shall bear its own legal and other costs pursuant to r 37 of the SIAC Rules;

(e) the costs of the SIAC Arbitration pursuant to r 35 of the SIAC Rules shall be borne equally as between SSCN (50%); and SACOFA (50%); and

(f) all other claims in this arbitration be dismissed.

[12] The final award was to be complied with by 11 August 2023.

[13] Following the final award, on 24 July 2023, SSCN filed the OS pursuant to s 38(2) of the AA for the said award to be recognised as binding and be enforced by entry as a judgment.

SSCN'S CASE FOR REGISTRATION AND ENFORCEMENT OF THE FINAL AWARD

[14] SSCN asserts:

(a) that by producing the duly certified copy of the final award and the duly certified copy of the SAA (and the three supplementary agreements), it has fulfilled the requirements for recognition and enforcement of the final award;

(b) the court should in dealing with an application under s 38 of the AA adopt a 'mechanistic' or formalistic approach and so long as the award and arbitration agreement, whether a certified true copy or original copy, the courts would treat the production of these documents as prima facie proof of compliance with s 38 of the AA — *Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal* [2014] 3 MLJ 648; [2014] 4 CLJ 525;

(c) SACOFA bears the burden of establishing why the OS should not be granted;

(d) SACOFA may only rely on the exhaustive grounds set out in s 39 of the AA and no other — the Federal Court in *CTI Group Inc v International Bulk Carriers SPA* [2017] 5 MLJ 314 at para [106] held that a respondent may only rely on 'any one or more of the grounds set out in s 39 and no other' to challenge recognition and enforcement; and

(e) in view that SSCN has complied with s 38 of the AA and SACOFA has not discharged its burden of establishing any of the grounds under s 39 of the AA, the OS should be allowed.

SACOFA'S GROUNDS FOR RESISTING RECOGNITION AND ENFORCEMENT OF THE FINAL AWARD

[15] SACOFA relies on ss 39(1)(a)(iv), (v) and/or (vi), and (b)(ii) of the AA and in gist contended that:

(a) the tribunal's decision that SSCN was the beneficial owner of the SSCN's built facilities arising from its interpretation of cl 6 of the SAA was not in accordance with Malaysian law:

(i) such decision did not fall within the terms of the submission to the SIAC arbitration which required the application of Malaysian law; and/or

(ii) such decision was not in accordance with the agreement of the parties, as they had agreed that the governing law was Malaysian law;

(iii) cl 6.1 was clear and unambiguous and did not provide for SACOFA to hold SSCN's built facilities on trust in the manner contended. The arbitrator was obliged to apply a contextual approach and there was no basis under Malaysian law for a term to that effect to be implied into that clause — *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177;

(iv) cl 6.1 to 6.3 SAA could not be interpreted to the effect that SSCN was the true beneficial owner of SSCN's built facilities so as to countenance a circumvention of or defiance of s 126 of the Communications and Multimedia Act 1998 ('the CMA'), as SSCN was never licenced to own network facilities, which SSCN's built facilities are; this is a contravention of Malaysian public policy indicated by the licencing framework under the CMA; and

(v) the conclusion of the tribunal that SSCN was the beneficial owner of the said facilities rendered the SAA illegal and this court cannot permit the registration and enforcement of an award that is illegal.

(b) the arbitrator was not empowered, as a matter of Malaysian law to make a decision that SACOFA had committed the act of conversion of SSCN's built facilities and make an award for the delivery up of SSCN's built facilities. Malaysian law dictates that orders for delivery up can only be granted as a relief in claims for detinue and not conversion. SSCN had not made a claim for detinue. In conversion, the relief lies in damages, see *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165 at p 168; [1982] CLJ Rep 257 at p 262 (FC) and *Stone World Sdn Bhd v Engareh (M) Sdn Bhd* [2020] 12 MLJ 237; [2020] 9 CLJ 358 (FC) at para [54] to [60]. In short, the arbitrator's conclusions:

(i) did not fall within the terms of the submission to the SIAC Arbitration, which required the application of Malaysian law;

(ii) went beyond the scope of the submission to the SIAC Arbitration as SSCN did not make a claim for detinue; and/or

(iii) which applied the Court of Appeal case in *OSK Trustees Bhd (as trustees for Sunway Real Estate Investment Trust) & Anor v Metroplex Holdings Sdn Bhd* [2020] 3 MLJ 358 over the Federal Court cases failed to apply Malaysian law as the agreed governing law by the parties, and/or failed to adhere to stare decisis and therefore contravened public policy.

(c) SSCN's claim for conversion in the SIAC Arbitration overlaps with that of SACOFA's Johor Bahru High Court Suit No JA-22NCVC-162–10 of 2022 ('JBHC suit') because the claim for conversion relates to the re-entry by SACOFA into SACOFA's landing station and touches on lease agreement related disputes in the JBHC suit.

[16] SSCN disagreed, and countered that the grounds advanced by SACOFA to resist registration and enforcement are without basis:

(a) firstly, the final award dated 14 July 2023 is final and binding pursuant to r 32.11 of the SIAC Rules and s 36(1) of the Arbitration Act 2005

(b) second, SACOFA's contention that there are purportedly overlaps between the SIAC Arbitration and the JBHC suit is clearly caught by the principle of res judicata and SACOFA is estopped from relying on such ground as the contention was raised before and rejected by the High Court, two different Court of Appeal panels, as well as the arbitrator:

(i) SACOFA's anti-arbitration injunction application which the High court dismissed on 7 May 2023;

(ii) SACOFA's application to the Court of Appeal J-02(IM)(NCvC)-808–05 of 2023 pursuant to s 44 of the Courts of Judicature 1964 for interim orders in virtually identical terms of its High Court application which was heard and dismissed on 15 June 2023;

(iii) SACOFA's appeal against the dismissal of its anti-arbitration injunction application which was heard and dismissed by a different panel of the Court of Appeal on 7 July 2023; and

(iv) the arbitrator's ruling that he has jurisdiction over the dispute concerning ownership of and/or right to possession of SSCN's built facilities is further an implicit rejection of the respondent's contention that the re-amended statement of claim still fundamentally relate to the lease agreement as these are 'separate disputes under the SAA which were properly to be determined under the arbitration agreement contained therein' — para 91 of the final award.

(c) third, the arbitrator is vested with jurisdiction to rule on issues of ownership and/or right to possession of SSCN's built facilities as these are matters governed by and/or emanated from the SAA;

(d) fourth, the issues raised by SACOFA which have already been adjudicated upon amounts to a challenge on the merits of the final award by 'go(ing) behind the award' and 'reargue(ing) matters which have been comprehensively dealt with in the course of arbitration' — *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as*

Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1 (FC) and *Qingdao Hongdaxinrong International Trade Co Ltd v Charterwin Trading Sdn Bhd and other cases* [2023] MLJU 1467. Even if the arbitrator has committed any error of law, it is not reviewable; and

(e) fifth, there is no risk that registration and/or enforcement of the final award will contravene the Communications and Multimedia Act 1998 as the final award allows delivery-up to be made to SSCN's nominated party, SEAX Malaysia Sdn Bhd who possesses the relevant licences.

LEGAL PRINCIPLES

[17] As the enforcement application is made under s 38 of the AA and the grounds of objection are made under s 39 of the AA, they are produced for ease of reference:

38 Recognition and Enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce —

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, 'foreign State' means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958

39 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —

(a) where that party provides to the High Court proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the

A appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration*;

B (v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*;

(vi) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act*; or

C

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

D

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

E (ii) *the award is in conflict with the public policy of Malaysia*.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

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(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

G **[18]** In this case, it is not disputed that SSCN has complied with the formal requirements by producing the duly certified copy of the final award and the duly certified copy of the SAA (and the three supplementary agreements). The burden then shifts to SACOFA to satisfy the court why recognition and enforcement should not avail SSCN.

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[19] Section 39 of the AA restricts the specific grounds upon which recognition or enforcement of an award can be refused by the courts.

I **[20]** In *Tune Talk Sdn Bhd v Padda Gurtaj Singh* [2020] 3 MLJ 184 the Court of Appeal held:

[150] Sections 38–39 of the AA are meant to be *exhaustive*. There is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitration award under the AA.

[21] I now turn to deal with SACOFA's challenges. A

[22] In reading the final award, I am reminded by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28; [2007] 3 SLR 86 at para 65: B

> ... it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather an award should be read generously.

[23] Reading the award generously in line with *Soh Beng Tee*, I hold that the matters dealt with in the final award were matters well within the arbitrator's domain. C

[24] Having considered carefully the submissions of the parties and read the cause papers, in my judgment, the issues raised by SACOFA do not fall within any of the grounds set out in s 39 of the AA. D

[25] I am of the respectful view that SACOFA's objections that:

(a) the arbitrator's interpretation of cl 6 of the SAA that led to his finding that SSCN is beneficial owner of SSCN's built facilities was inconsistent with Malaysian law and thus fell outside the terms of submission to the arbitration; E

(b) the arbitrator's failure to apply Malaysian law, where orders for delivery up can only be granted as relief in claims for detinue and not conversion; and F

(c) the overlap between the conversion claim in SIAC Arbitration and the JBHC suit on the basis that SSCN's claim for conversion relates to SACOFA's re-entry into the demised land are in the nature of an impermissible attempt to appeal. A generous reading of the final award makes clear that the arbitrator had considered the evidence and the arguments of the parties in coming to his findings in rendering the final award. His findings on the ownership claim is set out at paras 109 to 126, the findings on conversion, why he applied *OSK Trustees*, and whether the conversion claim in the SIAC arbitration overlaps with the JBHC suit were comprehensively set out at paras 90 to 99 of the final award, in particular paras 94, 95, 96 and 97, also paras 135, 136, 137 and 142. G H

I

[26] In my respectful view, SACOFA's complaints amount to failure on the part of the arbitrator to appreciate evidence, facts and arguments which SACOFA conceive as favourable to it, and in effect, stripped bare of legal niceties, is nothing more than a challenge on the merits of the claim, which is

not open for this court to delve into as they do not concern s 39 of the AA. These matters have been comprehensively dealt with in the course of arbitration. SACOFA as the losing party in arbitration is not entitled to relitigate. In this regard, the Chief Justice of Singapore, Menon CJ, in delivering the judgment of the Court of Appeal in *AKN and another v ALC and others and other appeals* [2015] SGCA 18; [2015] 3 SLR 488 at para [39] *cautioned the courts against attempts by ingenious counsel to disguise what is substantially an appeal on the legal merits of an arbitral award as a challenge on process failures during the arbitration*:

> 39. *In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the real nature of the complaint* ...

[27] The Federal Court in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213 reminded that courts do not review the merits of the arbitral tribunal's decision:

> *As a matter of principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process*. The role of courts in the arbitral regime in general is one of assistance supportive of the arbitral process and not one of interference with it. Bearing in mind the two primary objectives of the Model Law (respect for and preservation of party autonomy and ensuring procedural fairness), *the courts do not review the merits of the arbitral tribunal's decision*. (Emphasis added.)

[28] As regards the arbitrator's conclusion on ownership of the SSCN's built facilities, given the construction of the SAA is a question of law to be determined by, and within the remit of the arbitrator, I take the view that EVEN IF the arbitrator had wrongly interpreted the SAA, it does not bring the matter within s 39 of the AA as this court is not entitled to substitute its own interpretation. In *Cairn Energy India Pty Ltd & Anor v The Government of India* [2009] 6 MLJ 795 the Court of Appeal:

> [24] *There was nothing improper for the majority arbitrators to have been persuaded by the construction of the appellants, and could not be said to have acted so erroneously that a court must set aside that finding. It was just a question of the arbitrators choosing one reasonable construction over the other. It cannot be overly emphasised that a difference of opinion in the construction of the facts and provisions, and in light of the majority arbitrators' plausible conclusion, is insufficient ground to conclude that a manifest error of law had been established, which allegedly had caused an error on the face of the award.*
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> ...
>
> [45] *There could be no doubt that as against the construction by the arbitral tribunal, the court below had a different construction. So evidently, therefore, the court below had treated the application before it as an appeal.*

[46] *But even if the issue before the court below were a question of mixed fact and law, it was still not open to the court below to reopen the issue, and or to construct the PSC* (see *Pembinaan LCL Sdn Bhd v SK Styroform and Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). The court below had no appellate powers. If it were a question of mixed fact and law, it was only open to the court below to determine whether there was error of law on the face of the award. *The court below identified an error of construction as the error of law. But an error of construction is not a sufficient ground to set aside the award* (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* citing *Worsdell v Holden* (1859) 1 LT 14). (Emphasis added.)

[29] In accord with the spirit of the judicial approach of minimal curial intervention, in dealing with construction of an agreement, the Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423 through Richard Malanjum CJ (Sabah and Sarawak) as His Lordship then was, emphasised:

[52] We note that *the Arbitrators were faced with a question on the construction of a clause in an agreement*. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. *The fact that the learned majority arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge*.

[53] And as Scrutton LJ put it '... *if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences*; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; *if you choose to go to Caesar you must take Caesar's judgment*' (see *African and Eastern (Malaya) Ltd v White, Palmer and Co Ltd* (1930) 36 Ll L Rep 113 cited with approval by the Court of Appeal in *Dato' Teong Teck Kim v Dato' Teong Teck Leng* [1996] 1 MLJ 178; [1996] 2 CLJ 249).

[30] Not only that, s 36 of the AA and r 32.11 of the SIAC Rules make the final award final, binding and conclusive. Rule 32.11 reads:

Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, *the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay*. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.

[31] In amplification of the preceding paragraphs, it is apposite to be reminded again of the policy of minimal curial intervention reiterated recently by the Federal Court in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd & another appeal* [2021] 1 MLJ 1; [2020] 9 CLJ 466 (FC) where it stated at paras [7] to [10]:

[7] *It was submitted that the decision of the High Court and the Court of Appeal to*

interfere with the arbitration award offends the spirit of ss 8 and 36 of the Act and the principles of arbitral finality and minimal intervention which if not corrected will undermine the value of the arbitral process and cause litigants to run away from such alternative dispute resolution avenue.

[8] *Section 8 of the Act enshrines the principle of minimal interference by the court, which is an ingrained aspect of the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration*: see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 (CA) which was cited with approval by this court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1.

[9] This court in the recent case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 made the following observations on the effect of ss 8–9, 37 and 42 of the Act:

> *The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award. The court must always be reminded that constant interference of arbitral award will defeat the spirit of the AA 2005 which for all intent and purposes, is to promote one-stop adjudication in line with the international practice*. (see: *Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd & another appeal* [2011] MLJU 1537; [2013] 2 CLJ 395 ; *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83 and *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43). *In this regard, the court needs to recognise the autonomy of the arbitral process by encouraging finality; and its advantage as an efficient alternative dispute resolution process should not be undermined*. (Emphasis added.)

[10] *The principle is trite that courts do not exercise appellate jurisdiction over arbitration awards*: see *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. The only provisions in the Act that provide for the setting aside of domestic awards are s 37(1) and s 42(1)–(4) of the Act (before its deletion). (Emphasis added.)

[32] I agree with SSCN's argument that SACOFA's contentions here that there are overlaps between the SIAC Arbitration and the JBHC suit and that under Malaysian law, orders for delivery up can only be granted as relief in claims for detinue and not conversion are clearly caught by the principle of res judicata as such this court should not accede to SACOFA's fifth attempt to resuscitate this issue. With the greatest of respect, it smacks of abuse of process. SACOFA is also estopped from relying on such a ground.

[33] I find SACOFA's objections on tribunal's failure to apply Malaysian law as the agreed governing law by the parties, and/or failed to adhere to stare decisis in making conclusions that: (a) SSCN is the beneficial owner of the said facilities would contravene s 126 of the CMA rendered the SAA illegal; (b) SACOFA had committed the act of conversion of SSCN's built facilities

and make an award for the delivery up of SSCN's built facilities; and (c) that there is no overlap between the SIAC Arbitration and the JBHC suit are in conflict with the public policy of Malaysia, and that this court cannot permit the registration and enforcement of an award that is illegal, have not been made out. Even if the arbitrator had applied the law erroneously (I make no such conclusion), it is not for the court to intervene.

[34] This is because to succeed on the public policy ground, SACOFA has to contend with a very high threshold and 'demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice' — see dicta of Lee Swee Seng JC (now JCA) in *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd and another application* [2012] 5 MLJ 809, paras 42 and 44:

> [42] *With respect I fail to see how the award of the arbitrator can be said to be against the public policy of Malaysia. Surely if it is against the public policy* of Malaysia then the *respondent should have raised this at the outset of the arbitration and not after the award* had been given against the respondent. *Is the respondent Niche Properties suggesting then that if the award had been in its favour then it would not be against public policy*? There is nothing against public policy for the arbitrator to adjudicate on the rights of the parties under the JVA even though the subject matter has to do with a housing development project. ...
>
> [44] The Singapore decision of *AJT v AJU* [2010] 4 SLR 649 has this helpful explanation ... as to the substance and scope of 'public policy' ... it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' ... or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' ... or where it violates the forum's most basic notion of morality and justice ...

[35] *AJT v AJU* [2010] 4 SLR 649 referred by Lee Swee Seng JC (now JCA) quoted Judith Prakash J in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1:

> ... The party seeking to challenge an award has to identify the public policy which the award allegedly breaches and to show which part of the award conflicts with that public policy. Prakash J further cited *PT Asuransi* and stated that *in order for a plaintiff to succeed on the public policy argument, it has to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice*. (Emphasis added.)

[36] SACOFA in my respectful view has not demonstrated any such circumstances here that violate the most basic notions of morality and justice.

[37] I accept and agree with SSCN's argument that there is no risk that registration and/or enforcement of the final award will contravene the CMA as Relief No 2 of the final award allows delivery-up to be made to, inter alia,

SSCN's nominated party SEAX Malaysia Sdn Bhd who is in possession of the relevant licences. This was in fact addressed by the arbitrator in the final award. I thus find there is nothing illegal in the award that contravened public policy.

[38] On the complaint by SACOFA that the arbitrator had selectively read the statement of claim that had been amended and reamended, and reformulated the basis of the claim for conversion as being grounded only on the 'padlocking of the SSCN's built facilities' and thus not the dispute that was referred to arbitration, in my respectful view, it still boils down to the crux of the dispute which is essentially on who has the right to property in SSCN's built facilities; this is clearly connected to and/or arises out of the SAA, namely cl of the 6 SAA and thus within the remit of the arbitrator. At any rate, the arbitrator in making a determination of delivery-up without the need for access to SACOFA's land did reason at paras [94] and [95] of the final award that 'a claim in conversion can arise out of the interference with assets to which a party has a clear and immediate right to possess/ownership' and that such claim 'can arise independently of any questions surrounding access to the specified land which would arise under the lease agreement'. In this context, I agree with SSCN that SACOFA could have availed itself of an application under the r 29.1(b) of the SIAC Rule for early dismissal of the SIAC Arbitration if SACOFA felt that SSCN's claims or reliefs were outside of the arbitrator's jurisdiction or the scope of arbitration, but SACOFA did not make such application. In *Kelana Erat* at para [42], the court said such complaints should have been raised 'at the outset of the arbitration and not after the award had been given against the respondent'.

[39] In deciding if a claim that an arbitral award (or part thereof) was not within the scope of submission to arbitration, there is guidance from the Court of Appeal in *PT Asuransi Jaya Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, a decision followed on our shores. The court is to ascertain:

(a) the matters which were within the scope of submission to the arbitral tribunal; and

(b) whether the arbitral award (or the part being impugned) involved such matters, or whether it was a 'new difference' which would have been 'irrelevant to the issues requiring determination' by the arbitral tribunal.

[40] I find the issues culminating in the final award were at all material times submitted to the arbitrator for determination. With respect, the arbitrator is vested with jurisdiction to rule on the issues of ownership and/or right to possession of SSCN's built facilities as these matters emanated from the SAA. In *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83 the court held 'it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will

cover incidental matters'. The Court of Appeal in *Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd* [2016] 6 MLJ 166 reiterated the ratio in *Taman Bandar Baru Masai* and at para [35] stated 'As long as there has not been any breach of the rules of natural justice and parties had been given ample opportunity to submit on the issue which was ancillary to the claim or defence, the strict rule of pleadings does not apply in the arbitral regime'. I thus fail to see any procedural irregularities. It appears to me that SACOFA's dissatisfaction with the arbitrator's findings was ingeniously presented by its capable lawyers as a breach of s 20 of the AA in that SACOFA was not treated equally or that there was a breach of natural justice. This is so as the parties argued, did make submissions and presented their case on the very issue of ownership and/or right to possession of SSCN's built facilities.

[41] The arbitrator, on the documents and arguments before him, took stock of the state of play and did not accept SACOFA's arguments. It is clear to me that SACOFA is effectively challenging the arbitrator's presupposed errors of law.

[42] In my utmost respectful view, the arbitrator did not err whether in law or fact in arriving at his conclusions. It is trite that the arbitrator is the master of facts — see *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 at para [153]. Even if he did err, it is not a ground for setting aside or to refuse recognition.

[43] In *Tune Talk Sdn Bhd*, the Court of Appeal elucidated:

> [82] The grounds upon which an arbitration award may be refused recognition and enforcement are set out in s 39(1). These grounds (nine altogether) as stated earlier are exhaustive.
>
> [83] The word 'shall' in s 38(1) of the AA is, as the word denotes, a mandatory requirement (see *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 and *Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors* [2006] 6 MLJ 607).
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> [84] As the word 'shall' in s 38 of the AA denotes a mandatory requirement it therefore means that there is no room for the exercise of any discretionary power by the High Court if both substantive requirements in that section are fulfilled (which is the case here) and there are no grounds for refusal of recognition and enforcement under s 39 of the AA. (Emphasis added.)

[44] Tengku Maimun Tuan Mat CJ in *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors* [2020] 3 MLJ 1 (FC) along the same vein, held:

> [53] ... *having complied with the formal requirements of s 38 of AA 2005, the registration of the award under s 38 is granted as of right. Subject to s 39 of the AA 2005, in dealing with an application under s 38, a court is thus not required to go behind the*

A *award and to understand the arbitral tribunal's reasoning*. Hence, the Court of Appeal's conclusion that there was merit in the argument of the respondents that if only the dispositive part of the award is registered, the court tasked with enforcement will be deprived of the advantage of understanding the arbitral tribunal's reasoning, is with respect, misconceived.

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[45] Thus, once the requirements of s 38 of the AA are complied with, this court must recognise the final award and enforce the same by entry as a judgment in terms of the final award — unless there is a valid ground to refuse enforcement under s 39 of the AA. As adverted to earlier, on the factual matrix C here, I found no such ground that came within the scope of s 39 of the AA. In this regard, the court's intervention is circumscribed by s 8 of the AA which provides:

8 Extent of court intervention

D No court shall intervene in matters governed by this Act except where so provided in this Act.

[46] In consequence, the final award dated 14 July 2023 is final and binding pursuant to r 32.11 of the SIAC Rules and s 36(1) of the AA. SACOFA is E therefore bound to comply with the final award by 11 August 2023.

[47] I therefore have no valid reason not to recognise and enforce the final award. Accordingly, I would allow order in terms of the OS, with variation to prayer 2.2 for SACOFA to comply within 14 days from date of this order, and F costs to SSCN subject to allocator.

Originating summons allowed with costs to applicant subject to allocator.

Reported by Dzulqarnain Ab Fatar

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